

IN THE SUPREME COURT OF THE STATE OF MONTANA

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STATE OF MONTANA

No. DA 08-0499

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID W. GUNDERSON,

Defendant and Appellant.

ANDERS BRIEF

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Gregory R. Todd, Presiding

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INTRODUCTION

Upon conscientious examination of the record below, counsel hereby advises this Court that the Appellant, David Gunderson (Gunderson), has no non-frivolous basis for an appeal of the issues arising from his conviction and sentencing for burglary and attempted sexual intercourse without consent (SIWC). Undersigned counsel, therefore, moves this Court to allow counsel to withdraw from representing Gunderson in this appeal in accordance with *Anders v. California*, 386 U.S. 738 (1967), and Mont. Code Ann. § 46-8-103(1). If this Court deems there to be issues meriting briefing, counsel requests this Court to specify the issues to be briefed and to deny the motion without discharging undersigned counsel.

ISSUE PRESENTED

Should the undersigned counsel be permitted to withdraw from Gunderson's appeal in accord with the criteria established by the United States Supreme Court in *Anders*?

STATEMENT OF THE FACTS

At around 2:00 a.m. on July 3, 2007, Stephanie Randall (Randall) walked home to her apartment after an evening of drinking with friends at the nearby Rainbow Bar. (Trial Tr. at 122-23.) Upon arriving home, Randall went to her kitchen to make herself something to eat. (Trial Tr. at 133.) Gunderson, who was

hanging out in the area drinking with a friend, thought he recognized Randall from the Rainbow Bar and knocked on Randall's front door to see whether she recognized him. (Trial Tr. at 395, 443-44.) When Randall answered the door, Gunderson asked to use her telephone. (Trial Tr. at 134, 395.) Randall, who did not recognize Gunderson as anyone she had ever seen before, answered falsely that she did not have a telephone and shut the door on Gunderson. (Trial Tr. at 134, 395.) Nothing in this brief exchange concerned or frightened Randall. (Trial Tr. at 135-36.) Randall returned to her cooking, and after she finished her food, shut off the lights in her apartment and went to her bedroom to sleep. (Trial Tr. at 136-39.) Because of the hot summer air, Randall went to bed wearing just her bottom underwear. (Trial Tr. at 137.) Gunderson, for similar reasons, was walking around that night with his shirt off and stuffed in his back pocket. (Trial Tr. at 396.)

After his brief exchange with Randall, Gunderson went back across the street to talk with his friend. (Trial Tr. at 396.) Gunderson continued to believe that Randall was someone he knew, and about a half hour later he decided to go back to Randall's apartment to see again whether she would recognize him so that he could hang out with her for a while. (Trial Tr. at 396-97.) Gunderson testified that upon returning to Randall's door, he found it to be slightly ajar. (Trial Tr. at 398, 425.) Randall testified that she had shut the door but did not remember whether she had locked it. (Trial Tr. at 135.) Gunderson testified that he knocked

on the open door and then stepped into the apartment and called out asking whether anybody was home. (Trial Tr. at 398, 426, 429.) Gunderson testified that he had heard what sounded like a voice coming from the back of the apartment and had walked in to talk with the person. (Trial Tr. at 398, 426, 429.) Gunderson then found himself in a darkened bedroom. (Trial Tr. at 398, 430-31.) Randall, who Gunderson initially thought to be a man, was sleeping on the bed, partially covered in a sheet, with her back to the doorway. (Trial Tr. at 398-99, 430.)

Gunderson testified that he then sat down on the edge of the bed to talk with Randall. (Trial Tr. at 399, 430-31.) Gunderson recounted during direct examination,

I said “Hey, what’s up?” And I put my hands on her hip and kind of on her--by the kidney here and then I moved it down to her leg. I said, “Hey.” And at that time I kicked my shoes off, because I just bought those shoes and my feet was sweating. My feet was hurting from walking. And I turned and I didn’t want to put my shoe up on the bed. So when I turned sideways on the mattress to talk to her, she rolled over. She said, “What are you doing? What are you doing in my house?” I said, “I’m going to come over and bullshit with you.”

...

I thought when--she said, “What the fuck are you doing in my house?”

...

“I thought I heard you say come in or something.” I wasn’t sure. I don’t know, I wasn’t sure, because I was drunk. I mean I wasn’t drunk, but I was drinking all day.

. . .

She said, “Move.” And she went to get up off the bed, and I put my hand on her arm, and I said, “Where you going, man?” I said, “What’s up, man? Where are you going?”

(Trial Tr. at 399-400; *see also*, Trial Tr. at 431-32, 436.) Gunderson did not touch Randall’s exposed breasts or any other sexual part of her body and emphatically denied any intent to have sex with her. (Trial Tr. at 402, 446-47.) He denied kissing her neck or attempting to pull down her underwear. (Trial Tr. at 437-38.)

Gunderson further testified that once Randall awoke, he did not stop her from getting up and that they did not struggle on the bed. (Trial Tr. at 400, 402.) Once off of the bed, Randall took Gunderson’s shoes from the bedroom floor and threw them out the front door while continuing to angrily demand that Gunderson leave. (Trial Tr. at 400-01.) Gunderson testified he complied and started walking to the front door, while trying to talk Randall into calming down. (Trial Tr. at 401.) However, upon reaching the door, Gunderson noticed that his shirt had fallen out of his back pocket and so headed back towards to the kitchen hallway to pick it up. (Trial Tr. at 401.) Gunderson testified that while he was retrieving his shirt, Randall grabbed him and scratched his neck. (Trial Tr. at 401, 440.)

Randall testified as to events in the bedroom that she “woke up to somebody getting in my bed and touching me and kissing me.” (Trial Tr. at 140.) She testified that the person, whom she later identified as Gunderson, kissed her on her

“neck area” and that he was “rubbing” her thigh. (Trial Tr. at 140.) She told the jury that Gunderson also “was trying to pull my underwear off,” that “he grabbed the side of it and was pulling down on it,” and that “he had it in his hand, he had grabbed onto it . . . with his hands, with his whole hand.” (Trial Tr. at 140-41.) She then demonstrated to the jury how he had pulled one side of her underwear down “several inches.” (Trial Tr. at 141.) She testified that in response she “grabbed his hand and tried to stop him” and that she “started yelling for him to get off of me, and was asking him, like, ‘Who the fuck is this?’ And I started fighting him off and like trying to hit him and scratch him.” (Trial Tr. at 142.) Randall testified that Gunderson “was pretty intent in pulling it [her underwear] off” and that he would have been able to get it off had she not grabbed his hand and resisted. (Trial Tr. at 142.) Randall did not know whether her underwear was pulled with sufficient force to rip it or permanently stretch it. (Trial Tr. at 163-64.) She did not have any scratch marks on her hip. (Trial Tr. at 164.) Randall also testified that before she was able to kick him away and get off of the bed, Gunderson briefly pinned her arms down on the bed while telling her “to knock it off and calm down and saying that I invited him in.” (Trial Tr. at 143-44.) She did not have any bruises or injuries on her arms or anywhere else. (Trial Tr. at 164, 208.) Randall testified that when Gunderson was on her bed trying to pull down her underwear, she “was afraid he was going to rape me.” (Trial Tr. at 148.)

Randall testified that after “several minutes” struggling on the bed she was able to get up and turn on the bedroom light. (Trial Tr. at 144-46.) She testified that she then recognized the man in her bedroom as the man who had previously asked to use her telephone. (Trial Tr. at 144-45.) Both in the courtroom and through a photo array, Randall identified the man in her bedroom as Gunderson. (Trial Tr. at 158, 210-11.) Once up, Randall scratched Gunderson and “had him by the hair and was trying to drag him out by his hair.” (Trial Tr. at 147.) Randall testified that Gunderson was concerned about retrieving his shirt and shoes and that she picked up his shoes and threw them out the front door. (Trial Tr. at 147-48.) She testified that when she went to do this, she had to unlock the door, indicating that if Gunderson came in through the front door, he locked it behind him. (Trial Tr. at 151.)

On cross, Randall confirmed that Gunderson never had his pants off, never exposed his penis, never touched her exposed breasts, never put his hand inside her underwear, never hit her, and never threatened her. (Trial Tr. at 165-68.)

Although Randall testified at trial that “just rubbing my leg and pulling on my underwear is pretty sexual to me,” she acknowledged that she had previously given an interview to police in which she had agreed that there had been “no sexual contact.” (Trial Tr. at 167-68.) She also acknowledged that Gunderson was on his

way out of her apartment when he went back for his shoes and shirt and that she “was clawing at him and pulling his hair” at that time. (Trial Tr. at 169-70.)

After Gunderson left her apartment, Randall called a friend, Darrell Jager (Jager). (Trial Tr. at 149, 174.) Jager testified that Randall had called him around 2:30 to 3:00 a.m. on July 3, 2007. (Trial Tr. at 174.) Jager described Randall as “crying and somewhat hysterical.” (Trial Tr. at 174.) He told her to call the police. (Trial Tr. at 175.) Randall then called 911 and reported the incident. (Trial Tr. at 149, 153-54; State’s Ex. 8.)

Officer Shawn Wichman (Wichman) was in charge of Billings police’s initial response to Randall’s apartment. (Trial Tr. at 181.) Upon his arrival Wichman interviewed Randall. (Trial Tr. at 182.) He testified that she was “very distraught” and visibly shaking during the interview. (Trial Tr. at 182.) Wichman did not observe any injuries on Randall. (Trial Tr. at 189-90.) Although Wichman examined Randall’s bed, he did not take Randall’s bedding into evidence and did not notice bloodspots, hairs, or anything else unusual on the bed. (Trial Tr. at 190-91, 194-95.) Nor did Wichman take Randall’s underwear into evidence. (Trial Tr. at 193.) Wichman did, however, transport Randall to the Billings Police Department for a detective to take samples of the dried blood on her hand and under her fingernails. (Trial Tr. at 191.) The blood evidence was collected by Detective Paharik, and subsequently identified by the Montana Crime Lab as

belonging to Gunderson. (Trial Tr. at 201-06, 371-78.) The Detective did not attempt to collect a saliva sample from the area where Randall indicated that Gunderson had kissed her neck. (Trial Tr. at 212.)

Randall initially described Gunderson to police as a thin, white male in his forties with red hair, approximately 5'10", and wearing bright white tennis shoes and T-shirt. (Trial Tr. at 150, 181, 227; State's Ex. 8.) Officer Brad Ross (Ross) responding to a dispatch arising out of Randall's 911 call encountered Gunderson walking a few blocks from Randall's apartment with another man. (Trial Tr. at 225.) Ross stopped Gunderson on account of Gunderson meeting the suspect's general description, having red scratch marks on his neck, bright white shoes, and wearing a T-shirt. (Trial Tr. at 226-27.) Gunderson was sweating and the scratches on his neck had fresh, wet blood. (Trial Tr. at 228-29.) The time of the stop was 3:18 a.m. (Trial Tr. at 234.)

Gunderson did not try to run from Ross and when approached, gave his correct name and address. (Trial Tr. at 246-47.) Gunderson initially told Ross that he received the scratch mark on his neck during a bar fight at the Crystal Lounge. (Trial Tr. at 229.) Gunderson consented to a portable breath test and blew at 0.086. (Trial Tr. at 230-31.) Ross advised Gunderson of his *Miranda* rights, and Gunderson agreed to be interviewed. (Trial Tr. at 233.) Gunderson told Ross that after the bar fight at the Crystal Lounge, he had been hanging out at the Rescue

Mission until right before Ross stopped him. (Trial Tr. at 233.) The man with whom Gunderson had been walking testified at trial that he had only met Gunderson a few minutes before being stopped and that Gunderson had also told him that he had been in a fight at the Crystal Lounge. (Trial Tr. at 287-89.) Gunderson told Ross that he had been asked to leave the Crystal Lounge by one of the staff and that he had arrived at the Crystal Lounge that night by taking a taxi that he then jumped out of without paying. (Trial Tr. at 234.) Gunderson denied entering any residences without authorization and said that his DNA would not be present at any residential crime scene. (Trial Tr. at 235-36.) The interview was recorded and admitted into evidence at trial. (Trial Tr. at 237-38; State's Ex. 19.)

At trial Gunderson acknowledged that his statement regarding being injured in a bar fight was untrue and testified that he had been in Randall's apartment. (Trial Tr. at 405, 426.) Gunderson maintained, however, that he had been asked to leave the Crystal Lounge by staff that night and that he had in fact taken a cab to the Crystal Lounge and then jumped out without paying. (Trial Tr. at 407, 409.) The State introduced testimony from the bouncer working the Crystal Lounge that night that he did not remember kicking Gunderson or anyone else out. (Trial Tr. at 294, 302.) The State also introduced testimony from the owners of the two taxi companies in town that their company records did not indicate anyone being

dropped off at the Crystal Lounge during the relevant time and did not indicate any unpaid fares that night. (Trial Tr. at 277, 310-11.)

STATEMENT OF THE CASE

On July 19, 2007, the State charged Gunderson with information in the Thirteenth Judicial District Court with burglary and attempted SIWC. (D.C. Doc. 3.) The burglary charged alleged that Gunderson unlawfully entered Randall's residence with the purpose to commit sexual assault. (D.C. Doc. 3.) The attempted SIWC alleged that Gunderson "climbed into [Randall's] bed, tried to pull her underwear down, and kissed her neck while she slept" with the purpose to commit SIWC. (D.C. Doc. 3.) Gunderson was arrested on July 3, 2007, and remained in custody throughout the proceedings. (D.C. Doc. 84 at 1.) The Office of the Public Defender initially assigned Matt Claus to represent Gunderson but reassigned the case to Robert Kelleher on August 30, 2007. (D.C. Doc. 14.)

On July 30, 2007, and October 19, 2007, the State filed notices of intent to seek Gunderson's designation as a persistent felony offender. (D.C. Docs. 8, 24.) The State also filed a *Just* notice seeking to use Gunderson's 1995 SIWC conviction. (D.C. Doc. 21.) Although the district court granted the State's request (D.C. Doc. 48 at 3), at trial the State did not introduce any evidence regarding Gunderson's prior convictions. (Trial Tr. at 267-68, 271.)

On February 15, 2008, Gunderson filed a motion to dismiss for loss of evidence. (D.C. Doc. 51.) The motion argued that because police failed to collect Randall's bedding and failed to perform a rape kit exam of Randall for injuries the case should be dismissed. (D.C. Doc. 51.) The district court orally denied the motion on the first day of trial. (Trial Tr. at 8.) In the alternative, Gunderson sought a jury instruction relating to this alleged spoilage of evidence. (D.C. Doc. 51 at 3; Trial Tr. at 5-6, 452-58.) The district court declined to give such an instruction. (Trial Tr. at 459.)

The jury trial in this case began on February 19, 2008. (Trial Tr. at 1.) The trial had initially been scheduled for December 4, 2007, but had been continued upon defense motion. (D.C. Docs. 30-31.) The record on appeal does not explain why both this defense motion and the district court's order vacating were dated and filed after the initial December 4, 2007, trial date. (*See* D.C. Docs. 30-31.)

During voir dire, one of the potential jurors, Thorson, indicated that he worked at the Yellowstone County Detention Facility. (Trial Tr. at 17.) When asked by the prosecutor, "Are you familiar with Mr. Gunderson?" Thorson affirmed that yes, he was. (Trial Tr. at 17.) Based on this exchange Gunderson moved for a mistrial on the ground that Thorson's comments had tainted the jury pool by indicating that Gunderson was or had been in jail. (Trial Tr. at 104-05.)

The district court denied this motion. (Trial Tr. at 106.) The State removed Thorson through a preemptory challenge. (Trial Tr. at 107.)

During voir dire there were two challenges for cause, and the district court excused both of the challenged jurors. (Trial Tr. at 36, 75.) Defense counsel questioned a third potential juror, Jensen, at length regarding her thoughts that she would “probably have more of a bias that [Gunderson] is [guilty] simply because he’s charged.” (Trial Tr. at 78.) Jensen later indicated that she thought she could be fair. (Trial Tr. at 79.) Defense counsel did not challenge Jensen for cause and instead removed her with a preemptory. (*See* Trial Tr. at 79, 104, 106.)

At the start of the second day of trial, Gunderson requested to speak with the district court regarding his counsel’s performance. (Trial Tr. at 254.) The district court met with Gunderson and defense counsel outside of the State’s presence. (Trial Tr. at 254-55.) Gunderson expressed concerns that defense counsel failed to properly impeach Randall with her prior statement, failed to investigate and call as a witness the cab driver that drove Gunderson to the Crystal Lounge, failed to communicate with Gunderson in a timely manner, failed to alert Gunderson that the State had photos showing blood on Randall’s hand, and failed to call Gunderson’s nephew as a witness regarding the cab and events at the Crystal Lounge. (Trial Tr. at 255-58, 261-62, 264-65.) Gunderson indicate that although he had not previously raised these concerns to the district court, he had for months

been expressing his concerns to counsel and had written several letters to managers within the Office of the Public Defender. (Trial Tr. at 256-57, 259-60.)

The district court asked defense counsel whether there was anything he wanted to say. (Trial Tr. at 257.) Defense counsel indicated that he was still in the process of attempting to locate a bouncer at the Crystal Lounge who recognized Gunderson and a cab driver who matched Gunderson's description. (Trial Tr. at 257-58.) With respect to cross examination of Randall, defense counsel expressed his understanding that Gunderson's main concern was that defense counsel did not attempt to impeach Randall's testimony that Gunderson had pulled one side of her underwear down several inches with her prior statement that she had made sure her underwear stayed on and were not pulled down. (Trial Tr. at 260-61.) Defense counsel opined that any inconsistency between these two statements was "de minimis." (Trial Tr. at 261.)

The district court's only questions to Gunderson sought to establish that Gunderson had not previously raised these issues to the district court and to clarify to which portion of Randall's cross-examination Gunderson was referring. (Trial Tr. at 259, 261.) The district court then asked Gunderson what he wanted the district court to do at this stage in the proceedings, and the following exchange occurred:

MR. GUNDERSON: I don't want to waive no rights.

THE COURT: Well, okay. What does that mean? I don't--are your waiving rights doing or not doing something now?

MR. GUNDERSON: If I ask for him to be dismissed in representing me, we've got to start over, huh?

THE COURT: Well, that's a possibility if I were to rule that Mr. Kelleher's actions were so ineffective as to trigger relief under whether it's State versus Finley or Strickland, or cases related to that for ineffective assistance of counsel. If--and that's what I'm interpreting you to say.

MR. GUNDERSON: Yeah, I was just--I'm--

THE COURT: Go ahead.

MR. GUNDERSON: I leave the decision up to you.

THE COURT: Okay. Well, here's what I'm going to do. I--

MR. GUNDERSON: Because I feel he's ineffective.

THE COURT: Okay. Well, I am not going to replace Mr. Kelleher. I'm not going to declare a mistrial or to remove him. I guess the only relief I would give you, if you want to do it, but I would strongly urge you not to, is to let you defend yourself and have Mr. Kelleher on a standby. To do that in the middle of the trial would, I think, create all sorts of issues and questions and negative connotations to the jury. So I--as well as putting you in a difficult position acting as your own attorney. So I would strongly urge you not to do that.

(Trial Tr. at 262-63.)

The district court indicate to Gunderson that based on the State's trial evidence and representations it appeared that it would be difficult for defense counsel to find witness to testify that Gunderson had taken a cab to the Crystal Lounge and had then been bounced out of that bar. (Trial Tr. at 264.) Defense

counsel indicate that he too had “difficulty” with the idea of finding the cab driver described by Gunderson as the cab company records did not indicate such a ride occurred. (Trial Tr. at 265.) The district court then inquired of defense counsel whether he was close to tracking down any of these witnesses and whether he needed “some time.” (Trial Tr. at 266.) Defense counsel indicated he had a lead and was still trying to find the cab driver, and the district court responded that if defense counsel could locate him before the end of the trial, the district court would accommodate his testimony within the trial’s schedule. (Trial Tr. at 266.) Gunderson then indicated that another witness who could testify to Gunderson’s whereabouts approximately fifteen minutes before the cab ride was presently in the county jail. (Trial Tr. at 267.) The district court responded that the Gunderson and defense counsel would need to discuss the tactical ramifications of calling this person as a witness. (Trial Tr. at 267.) The district court concluded the conversation with “I’m not going to remove Mr. Kelleher. I don’t think that the things that you have stated have risen to the level of removing him.” (Trial Tr. at 268.)

Also on the morning of the second day of trial, defense counsel requested the district court to inquire of the jurors whether any of them had read an article in that day’s paper indicating that Gunderson had had a previous rape conviction. (Trial Tr. at 269.) The State objected to the request on the grounds that the jurors

must be presumed to be following the judge's instructions not to read about the case in the paper and that no affirmative evidence existed that any of them had read the article. (Trial Tr. at 270.) The district court denied the request, agreeing with the State and also not wishing to risk drawing the jurors' attention to the article. (Trial Tr. at 272.)

Following the close of the State's case-in-chief, defense counsel made a motion to dismiss for insufficient evidence. (Trial Tr. at 380-81.) The district court denied the motion. (Trial Tr. at 382.)

Gunderson was the only witness called to testify for the defense. (*See* Trial Tr. at 392, 449.) The district court made no further inquiry of defense counsel regarding why none of the witnesses identified and requested by Gunderson were called. The record contains no other discussion of Gunderson's complaints regarding defense counsel and no other inquiries by the district court.

During the settling of jury instructions, defense counsel made no objection to any of the State's offered instructions. (Trial Tr. at 451, 459.) Defense counsel did offer two instructions that were opposed by the State and declined by the district court. (Trial Tr. at 451-59.) The first sought to instruct the jury to treat the defendant's testimony "just as you would the testimony of any other witness." (D.C. Doc. 58.) The second sought to instruct the jurors that they could infer from

the State's failure to preserve evidence that the missing evidence would have been adverse to the State's case. (D.C. Doc. 58.)

Following the district court's instruction of the jury (D.C. Doc. 59; Trial Tr. at 464), opposing counsel offered closing arguments. Neither side made any objection to the other's closing. (*See* Trial Tr. at 465-513.) The jury returned guilty verdicts on both counts. (D.C. Doc. 63-64; Trial Tr. at 514.) The district court then ordered a pre-sentence investigation and a sexual offender evaluation. (D.C. Doc. 76; Trial Tr. at 518-19.)

Prior to sentencing, defense counsel filed a motion for a new trial and brief in support. (D.C. Docs. 66-67.) The motion argued that a new trial was warranted because of the district court's refusal to give the defendant's two proposed jury instructions, because of jury taint from prospective juror's comments indicating that Gunderson was or had been in jail, because of the State's failure to present sufficient evidence to convict, and because of cumulative error. (D.C. Docs. 66-67.) The district court heard oral argument on the motion and then denied it. (D.C. Doc. 77; 5/23/08 Tr.)

At sentencing, defense counsel argued that Mont. Code Ann. § 45-5-503(3)(c) did not authorize the district court to punish Gunderson's attempted SIWC offense with life in prison without the possibility of parole because Gunderson did not cause serious bodily injury. (6/16/08 Tr. at 9-12.) Defense

counsel indicated several factual disagreements with the pre-sentence investigation's criminal history report but made no other objections to the sentence or its conditions. (6/16/08 Tr. at 3-4.) The district court rejected counsel's argument regarding Mont. Code Ann. § 45-5-503(3)(c) and sentenced Gunderson to 100 years in prison as a persistent felony offender on the burglary and life in prison consecutive on the attempted SIWC, both to be served without the possibility of parole. (6/16/08 Tr. at 23-24.) The district court also designated Gunderson as a Level 3 sexual offender as recommended by the evaluator's report. (6/16/08 Tr. at 22, 25.) The district court made oral findings and stated its reasons for imposing these sentences. (6/16/08 Tr. at 12-26.) The district court also summarized these findings and reason in its written judgment and attached a written transcript of its oral findings and reasons to the judgment. (D.C. Doc. 86.)

Gunderson filed a timely notice of appeal to this Court.

ARGUMENT

I. UNDERSIGNED COUNSEL SHOULD BE PERMITTED TO WITHDRAW FROM GUNDERSON'S APPEAL IN ACCORD WITH *ANDERS*.

In *Anders*, the United States Supreme Court concluded that when counsel on appeal finds the case to be wholly frivolous after a conscientious examination, counsel should advise the court and move to withdraw. *Anders*, 386 U.S. at 744. The request to withdraw must be "accompanied by a brief referring to anything in

the record that might arguably support the appeal.” *Anders*, 386 U.S. at 744. This brief addresses those potential matters.

Furthermore, in the realm of appellate criminal defense practice, a dilemma arises between counsel’s duty of diligence to his client and the duty of candor before the court. The United States Supreme Court addressed this dilemma as follows:

We interpret the discussion rule [of *Anders*] to require a statement of reasons why the appeal lacks merit which might include, for example, a brief summary of any case or statutory authority which appears to support the attorney’s conclusions, or a synopsis of those facts in the record which might compel reaching that same result. We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with ‘notice’ that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit.

McCoy v. Court of Appeals of Wisconsin, District 1, 486 U.S. 429, 440 (1988).

Thus, the appellate defender must dutifully report to the Court that no merit exists in the appeal, but cannot argue against his client’s position. The attorney takes the unaccustomed position of adopting a position for which he cannot advocate or attempt to persuade. Thus, he must allow the record to speak for itself.

Here, the undersigned is compelled by his duty of candor before the Court in accord with *Anders* to provide this Court with notice that review of the entire record and diligent research has revealed that no non-frivolous issues are present in this appeal.

II. THE RECORD MIGHT ARGUABLY SUPPORT CERTAIN APPELLATE ISSUES.

A. Did the State's Failure to Collect the Alleged Victim's Bedding, Underwear, and Rape Kit Require Dismissal of the Charges?

In *State v. Halter*, 238 Mont. 408, 777 P.2d 1313 (1989), this Court affirmed the dismissal of theft and illegal branding charges after the State negligently allowed the allegedly stolen bull to be sold and slaughtered, preventing defense expert examination of its brands. Reversal for the State's negligent suppression of evidence requires a defendant to prove that the evidence was material in that its exculpatory value was apparent before the evidence was destroyed and comparable evidence cannot be obtained. *State v. Sweet*, 1998 MT 30, ¶ 20, 287 Mont. 336, 954 P.2d 1133 (*quoting State v. West*, 252 Mont. 83, 87, 826 P.2d 940, 943 (1992)); *Halter*, 238 Mont. at 412, 777 P.2d at 1316 (*quoting California v. Trombetta*, 467 U.S. 479, 488-89 (1984)); *see also, State v. Brown*, 1999 MT 133, ¶¶ 23-31, 294 Mont. 509, 982 P.2d 468 (surveying cases); *State v. Turner*, 265 Mont. 337, 349-50, 877 P.2d 978, 985-86 (1994) (discussing failure to preserve clothing that could have shown the absence of blood splatter on defendant). Although, it is not clear that the State in *Halter* was ever itself in possession of the bull, *see Halter*, 238 Mont. at 409-10, 777 P.2d at 1314, this Court has often said that “Police officers do not have an affirmative duty to search out favorable evidence for the defendant.” *State v. Patton*, 280 Mont. 278, 284, 930 P.2d 635,

639 (1996) (*quoting State v. Sadowski*, 247 Mont. 63, 79, 805 P.2d 537, 547 (1991)).

Gunderson filed a pre-trial motion to dismiss on the grounds that the State “failed to collect and preserve exculpatory evidence” including Randall’s bedding and underwear and a rape kit. (D.C. Doc. 51.) This claim or an alternative claim for a jury instruction based on the State’s loss of exculpatory evidence was reiterated on the morning of trial and in Gunderson’s motion for a new trial. (Trial Tr. at 6; D.C. Doc. 67 at 4-7.) Gunderson argued and could argue again on appeal that had the bedding been collected, testing would have shown an absence of blood and loose hairs and that this absence would have impeached Randall’s trial testimony of fighting and scratching on the bed. Similarly, Gunderson could argue that examination of the underwear and a rape kit would have shown the underwear was not stretched out and that Randall had no injuries or indications of sexual intercourse. Under Gunderson’s theory, his evidence would have been exculpatory in that the absence of stretching and injuries would have impeached Randall’s testimony that Gunderson pulled one side of her underwear down and pinned her arms down on the bed. Gunderson could raise these claims under both the Montana and federal Constitutions.

Success of this claim on appeal would depend upon the Court holding that the State has a legal obligation to collect exculpatory evidence when a defendant is

unable to do so himself due to incarceration and upon the Court finding that the evidence here was exculpatory. Of note, the law enforcement officers who testified at trial indicated that they did not see any blood or loose hairs on the bed and did not see any bruising or other physical injuries on Randall. (Trial Tr. at 189-91, 194-95.) Randall herself indicated that there was no sexual intercourse and that she was not injured. (Trial Tr. at 166-68, 208; State's Ex. 8.)

B. Did the State's Failure to Collect the Alleged Victim's Bedding, Underwear, and a Rape Kit Require Instructing the Jurors That They Could Infer From the State's Failure That the Evidence Would Have Been Adverse to the State?

This Court reviews jury instructions in criminal cases to determine whether “the jury instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case.” *State v. Pol*, 2008 MT 352, ¶ 22, 346 Mont. 322, 195 P.3d 807; *State v. Archambault*, 2007 MT 26, ¶¶ 25-27, 336 Mont. 6, 152 P.3d 698. “[W]hile district courts must instruct the jury on each theory which is supported by the record, the defendant is not entitled to have the jury instructed on every nuance of his or her theory of the case” *Archambault*, ¶ 25. A district court has discretion to instruct the jury on adverse inferences arising from the spoliation of evidence. *United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000).

Based on the lost evidence discussed above, Gunderson sought and was denied an instruction that the jury could “infer from the State's failure to preserve evidence that the evidence would have been adverse to the State.” (D.C. Doc. 58;

see also, D.C. Doc. 67 at 3; Trial Tr. at 453-59; 5/23/08 Tr. at 6-10.) Gunderson could argue on appeal that the denial of this instruction was an abuse discretion that prejudiced his right to fair trial and warrants reversal.

C. Did the Comments of a Prospective Juror Indicating That Gunderson Had Been in Jail so Taint the Jury Pool as to Require a Mistrial?

Gunderson argued during jury selection and in his motion for a new trial that information that one of the prospective jurors was a county jailor and was familiar with Gunderson prejudiced Gunderson's right to a fair trial by creating the impression in the jurors' minds that Gunderson "must be some type of trouble maker." (D.C. Doc. 67 at 8.) Although the information regarding Gunderson having been arrested and held in custody was introduced at trial (*e.g.*, Trial Tr. at 408:11-12), Gunderson could argue that the inference of his incarceration arising from prospective juror's comments is akin to the due process violation arising from the jury seeing a defendant in shackles or prison attire at trial. *Cf. Estelle v. Williams*, 425 U.S. 501, 504-05 (1976) (prison attire); *State v. Merrill*, 2008 MT 143, ¶ 12, 343 Mont. 130, 183 P.3d 56 (shackles).

D. Did the District Court Err by Failing to Adequately Inquire Into Gunderson's Complaints of Ineffective Assistance of Counsel and by Failing to Hold an Evidentiary Hearing Regarding the Validity of His Complaints?

When a defendant alleges to the district court that his attorney is not providing effective assistance of counsel and requests his removal, the district

court must “make an adequate initial inquiry into the nature of a defendant’s complaint to determine if those complaints are ‘seemingly substantial.’” *Halley v. State*, 2008 MT 193, ¶ 16, 344 Mont. 37, 186 P.3d 859 (*quoting State v. Gallagher*, 1998 MT 70, ¶ 15, 288 Mont. 180, 955 P.2d 1371). “[A]n initial inquiry is adequate when the district court considers the ‘defendant’s factual complaints together with counsel’s specific explanations addressing the complaints.’” *Halley*, ¶ 17 (*quoting Gallagher*, ¶ 15). If the complaints are “of a seemingly substantial nature,” the district court must hold a full evidentiary hearing to address their validity. *Gallagher*, ¶ 23.

Here, Gunderson expressed concerns regarding counsel’s cross-examination of Randall and previous communication failures. (Trial Tr. at 255-56.) Additionally, Gunderson informed the district court that for months he had been requesting his attorney to investigate and locate a cab driver and a bar bouncer who could corroborate portion of Gunderson’s testimony regarding the evening of the alleged offenses. (Trial Tr. at 255-58, 261-62, 264-65.) Gunderson also told the district court that his attorney had failed to subpoena several other known witnesses (Gunderson’s nephew in Nevada and a friend named Brandon then in Yellowstone County jail). (Trial Tr. at 264, 267.) Gunderson stated that he felt trial counsel was “ineffective,” and the district court interpreted his complaints as a

request for trial counsel's removal although Gunderson himself was not explicit in requesting a substitution of counsel. (*See* Trial Tr. at 262-63, 268.)

The district court invited trial counsel to respond to Gunderson's complaints but made no specific inquiries into why trial counsel waited until the midst of trial to investigate the cab driver and bar bouncer witnesses or into why the other identified witnesses had not been subpoenaed. Trial counsel acknowledged that he "did just yesterday have [his] investigator try to locate a bouncer at the Crystal Bar by the name of Brent." (Trial Tr. at 257.) The discussion concluded with defense counsel stating that he would continue to look for the cab driver and the district court indicating it would accommodate calling these additional witnesses on the last day of trial. (Trial Tr. at 265-66.) The district court told Gunderson of defense counsel, "I'm not going to remove Mr. Kelleher. I don't think that the things that you have stated have risen to the level of removing him." (Trial Tr. at 268.) The district court made no further inquiry into allegations of trial counsel's investigative failings even when counsel rested his case after only calling Gunderson as a witness.

Gunderson could argue on appeal that the district court failed to adequately inquire into his allegations, in particular by making no follow-up inquiry after trial counsel called none of Gunderson's requested witnesses. Gunderson could also argue that his ineffective assistance allegations were of a seemingly substantial

nature and that the district court erred when it did not set a full hearing regarding Gunderson's allegations. Arguably the district court applied an incorrect standard when it evaluated Gunderson's concerns to determine whether they rose to the level of requiring new defense counsel rather than applying the *Gallagher* standard of whether the concerns were seemingly substantial and, therefore, warranting of a separate hearing to address their merits. *See Gallagher*, ¶¶ 25-26. Gunderson's remedy would be remand for an evidentiary hearing into the validity of his complaints. *Gallagher*, ¶ 26.

E. Did the District Court Err When it Refused to Inquire on the Second Day of Trial Whether Jurors Had Read a Local Newspaper Article Indicating That Gunderson Had a Prior Rape Conviction?

Whether a defendant's right to a fair trial has been prejudiced by publicity is a question within the district court's sound discretion. *State v. Henrich*, 268 Mont. 258, 265, 886 P.2d 402, 406 (1994). This Court has declined to require district courts to individually question jurors regarding publicity. *Henrich*, 268 Mont. at 265-66, 886 P.2d at 406-07 (summarizing *State v. Kirkland*, 184 Mont. 229, 602 P.2d 586 (1979), and *State v. Weaver*, 195 Mont. 481, 637 P.2d 23 (1981)).

During the middle of trial, the local newspaper published an article indicating that Gunderson had previously been convicted of rape. (Trial Tr. at 269.) The existence of this prior conviction was not a part of the evidence introduced at trial. The district court denied Gunderson's request to inquire of the

jurors whether they had read this article on the grounds that the jury was assumed to be following the district court's instructions not to read about the case and that inquiring about the article could do harm by drawing the jurors attention to the article. (Trial Tr. at 272.) Gunderson could argue that this denial to even inquire of the jurors violated due process by preventing him from assessing whether the jurors had been exposed to prejudicial information regarding his prior conviction.

F. Did the District Court Commit Plain Error When it Did Not Remove Prospective Juror Jensen for Cause After She Indicated Bias Against the Accused?

In *State v. Braunreiter*, 2008 MT 197, 344 Mont. 59, 185 P.3d 1024, this Court reversed a conviction where a prospective juror stated during voir dire that “[the defendant] has been charged. He has to prove he didn’t do it.” *Braunreiter*, ¶ 13. The Court held that this and other statements “reveal the kind of fixed state of mind that this Court repeatedly has deemed appropriate for a dismissal for cause.” *Braunreiter*, ¶ 21. Even in the absence of contemporaneous objections, this Court may discretionarily review errors implicating fundamental constitutional rights under the plain error doctrine. *State v. Daniels*, 2003 MT 247, ¶ 20, 317 Mont. 331, 77 P.3d 224.

Here, prospective juror Jensen indicated that in her mind charging documents are evidence. (Trial Tr. at 78.) In response to defense counsel’s inquiry that “it sounds like you’ve already decided that he’s probably guilty simply

because he's sitting there and he's charged," prospective juror Jensen replied, "I'd say I'd probably have more of a bias that he is simply because he's charged." (Trial Tr. at 78.) Jensen said that although she would try not to let it affect her, "there's a little bias there." (Trial Tr. at 79.) Although defense counsel did not challenge Jensen for cause, Gunderson could seek plain error review of district court not removing Jensen for cause following these statements of bias towards Gunderson.

G. Did the District Court Err in Denying Gunderson's Motion to Dismiss for Insufficient Evidence at the Close of the State's Case in Chief?

"In a criminal case, a motion for dismissal for insufficiency of the evidence under § 46-16-403, MCA, is only appropriate if, viewing the evidence in a light most favorable to the prosecution, no evidence exists upon which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." *State v. Bullman*, 2009 MT 37, ¶ 14, ___ Mont. ___, ___ P.3d ___. "In a sex offense case, the conviction may be based solely on the uncorroborated testimony of the victim." *State v. Duncan*, 2008 MT 148, ¶ 43, 343 Mont. 220, 183 P.3d 111; *see also*, *State v. Fish*, 2009 MT 47, ¶¶ 27-31, ___ Mont. ___, ___ P.3d ___; *State v. Shields*, 2005 MT 249, ¶¶ 17-30, 328 Mont. 509, 122 P.3d 421. With respect to questions of witness credibility, this Court refuses "to re-weigh the evidence on appeal." *Duncan*, ¶ 45.

Conviction of burglary requires the State to prove that a person “knowingly enters or remains unlawfully in an occupied structure with the purpose to commit an offense therein.” Mont. Code Ann. § 45-6-204(1). Here, the State alleged that Gunderson entered Randall’s apartment with the purpose to commit sexual assault. (D.C. Doc. 3.) Sexual assault is knowingly subjecting another to touching of the sexual or other intimate parts in order to knowingly or purposely cause bodily injury, humiliate, or arouse or gratify the sexual response of either party. Mont. Code. Ann. §§ 45-2-101(67), 45-5-502(1).

Montana Code Annotated § 45-4-103(1) provides that “A person commits the offense of attempt when, with the purpose to commit a specific offense, he does any act toward the commission of such offense.” The Court has interpreted this language to require performance of “a material step towards” commission of the underlying offense. *State v. Marshall*, 2007 MT 198, ¶ 18, 338 Mont. 395, 165 P.3d 1129; *see also*, *State v. Ribera*, 183 Mont. 1, 11, 597 P.2d 1164, 1170 (1979) (“there must be at least some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter.”) (*quoting State v. Rains*, 53 Mont. 424, 164 P. 540 (1917))). SIWC requires proof of knowingly penetrating the mouth with a penis or penetrating the vulva or anus with a body part or foreign object to knowingly or purposely cause bodily injury, humiliate, or arouse or

gratify the sexual response of either party. Mont. Code Ann. §§ 45-2-101(69), 45-5-503(1).

With respect to the attempted SIWC, Gunderson could argue on appeal that even accepting the State's evidence that he kissed Randall's neck and pulled down one side of her underwear several inches, such conduct was not a material step towards penetrating Randall's vulva or anus. Gunderson could also argue that no evidence was introduced upon which a rational jury could have found beyond a reasonable doubt that in doing so he had the conscious objective of penetrating Randall's vulva or anus. With respect to the burglary, Gunderson could argue there was insufficient evidence to prove that it was his conscious object in entering Randall's apartment to touch her sexual or other intimate parts in order to cause sexual gratification, injury, or harassment. In support of these arguments, it was uncontested at trial that Gunderson did not take off his pants, did not verbally express any intention of having sex with Randall, and did not touch or make any movement towards touching Randall's groin, buttocks, or exposed breasts when he had the opportunity to do so.

H. Did the District Court Commit Reversible Error When it Declined to Give an Instruction That a Defendant's Testimony Should Be Treated the Same as Any Other Witness's?

Defense counsel sought a jury instruction based upon a Ninth Circuit model criminal jury instruction indicating that "The defendant has testified. You should

treat this testimony just as you would the testimony of any other witness.” (D.C. Doc. 58.) Defense counsel argued that such an instruction was necessary to offset a given instruction indicating that the jurors may consider whether witnesses have interests in the case’s outcome. (5/23/08 Tr. at 2-3; Trial Tr. at 452; D.C. Doc. 67 at 2-3.) The offered instruction was based on Ninth Circuit Model Criminal Jury Instruction 3.4, and Gunderson could argue federal constitutional due process required that it be given. Gunderson could argue on appeal that the lack of such an instruction prejudiced him because the given instructions indicated to the jury that he was less worthy of belief than other witness because he had the greatest interest in the case’s outcome. *Cf. State v. DuBray*, 2003 MT 255, ¶¶ 87-93, 317 Mont. 377, 77 P.3d 247.

I. Did the District Court Commit Plain Error When it Gave the Jury Disjunctive Definitions of “Purposely” and “Knowingly” That Defined the Terms as Relating Either to Conduct or to Result?

This Court held in *Patton* that a district court erred in instructing the jury regarding a deliberate homicide charge that “A person acts purposely when it is his conscious object to engage in conduct of that nature or to cause such a result.” *Patton*, 280 Mont. at 290-91, 930 P.2d at 642-43. This Court explained that the “purposely” instruction in *Patton* was error because it “defined ‘purposely’ in an either-or-fashion, and allowed the jury to convict Patton solely on the basis that he consciously engaged in conduct without regard to whether harm was intended.”

Patton, 280 Mont. at 291, 930 P.2d at 643; *see also*, *State v. Lambert*, 280 Mont. 231, 237, 929 P.2d 846, 850 (1996); *State v. Rothacher*, 272 Mont. 303, 307-08, 901 P.2d 82, 85-86 (1995). The Court has found such instructional error harmless where no facts were presented at trial indicating that the defendant acted purposely or knowingly with respect to his conduct but not with respect to the prohibited result. *Patton*, 280 Mont. at 291-92, 930 P.2d at 643.

In the present case, both the “purposely” and the “knowingly” definitions given to the jury were disjunctive statements indicating that the terms could refer either to conduct or to result. (D.C. Doc. 59, Instr. 16, 21.) Gunderson could argue on appeal under plain error review that these disjunctive definitions relieved the State from having to prove every element of the offenses. The success of this argument would depend upon some material element of burglary or of attempted SIWC being result orientated and upon evidence having been admitted at trial indicating that Gunderson acted with the conscious object to engage in or awareness of his conduct but without the conscious object to cause or awareness of a high probability that he would cause a statutorily prohibited result. *See Patton*, 280 Mont. at 292, 930 P.2d at 643.

J. Did the District Court Err in Imposing a Sentence of Life Without Parole When Gunderson Did Not Cause Serious Bodily Injury?

Montana Code Annotated § 45-5-503(3)(c) provides:

If the offender was previously convicted of an offense under this section or of an offense under the laws of another state or of the United States that if committed in this state would be an offense under this section and if the offender inflicted serious bodily injury upon a person in the course of committing each offense, the offender shall be:

- (i) punished by death . . . ; or
- (ii) punished as provided in 46-18-219.

Montana Code Annotated § 46-18-219, in turn, defines the penalty of life without the possibility of release and mandates its imposition upon a second SIWC offense, unless one of the exceptions in Mont. Code Ann. § 46-18-222 applies.

At sentencing defense counsel argued that the more specific requirement of having inflicted serious bodily injury in Mont. Code Ann. § 45-5-503(3)(c) controlled over Mont. Code Ann. § 46-18-219's general provisions. (6/16/08 Tr. at 9-10.) The district court held that under Mont. Code Ann. § 45-5-503(2) it had authority to impose a maximum sentence of up to life imprisonment for SIWC and that under Mont. Code Ann. § 46-18-202 it had authority to make Gunderson ineligible for parole while serving that term. (6/16/08 Tr. at 23-24.) Gunderson could nonetheless argue on appeal that Mont. Code Ann. § 45-5-503(3)(c) only allows for life without parole for SIWC where serious bodily injury occurred.

K. Did the District Court Impose an Illegal Sentence When it Imposed Fifty-One “Conditions” on Gunderson?

At the conclusion of sentencing the district court stated, “I will also incorporate provisions 1 through 50 that are the conditions at the end of the presentence investigation report.” (6/16/08 Tr. at 26.) The written judgment states, “IT IS FURTHER ORDERED that the following provisions that are conditions at the end of the presentence investigation report are imposed:” and then lists fifty-one conditions relating to supervision by a “Probation & Parole Officer.” (D.C. Doc. 86 at 3-7.) The pre-sentence investigation report introduced the conditions with the statement, “If there is ever a period of community supervision the following conditions of probation shall apply.” (D.C. Doc. 84 at 10.) Gunderson was sentenced to life plus one hundred years in prison without the possibility of parole. (D.C. Doc. 84 at 1-2.)

This Court has held that a sentencing court has no general power to impose parole conditions, although a sentencing court may impose certain employment and contact conditions on sexual or violent offenders. *State v. Dennison*, 2008 MT 344, ¶¶ 12-15, 346 Mont. 295, 194 P.3d 704; *State v. Burch*, 2008 MT 11, ¶¶ 14-31, 342 Mont. 499, 182 P.3d 66; *see also*, Mont. Code Ann. § 46-18-255. If this Court were to interpret the fifty-one “conditions” in Gunderson’s written judgment as parole conditions rather than as probation conditions or meaningless appendages to Gunderson’s no parole sentences, most of them would be illegal under the

holdings in *Dennison* and *Burch*. See also, *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979) (allowing appellate review of illegal sentences even without a contemporaneous objection). Arguably, even if the conditions are probation conditions, the district court was without authority to impose them because no portion of Gunderson's sentence was suspended. Cf. *State v. Letasky*, 2007 MT 51, ¶ 15, 336 Mont. 178, 152 P.3d 1288 ("A condition of a suspended sentence would be meaningless without reference to the independent mandate, specifically, the order of suspended sentence, that it conditions.").

L. Did Trial Counsel Provide Ineffective Assistance?

Reversal for a denial of a defendant's right to effective assistance of counsel requires the defendant to prove to this Court that his attorney's performance was deficient and that the deficient performance prejudiced the defense. *State v. Racz*, 2007 MT 244, ¶ 22, 339 Mont. 218, 168 P.3d 685. Review of an ineffective assistance of counsel claim is only appropriate on direct appeal where the record reveals why the attorney acted as he did or where there is no plausible tactical justification for the attorney's action or omission. *State v. Kougl*, 2004 MT 243, ¶¶ 14-21, 323 Mont. 6, 97 P.3d 1095.

On direct appeal, Gunderson could argue that his trial counsel was ineffective regarding errors discussed above for not sufficiently investigating the case and calling requested witnesses, for not adequately impeaching Randall, for

not challenging prospective juror Jensen for cause, for not objecting to the disjunctive mental state instructions, and for not objecting to imposition of the fifty-one conditions on a no-parole sentence. *But see Racz*, ¶¶ 25-29 (concluding that counsel’s decisions to not pursue removal of two prospective jurors for cause was not appropriately addressed on direct appeal); *Adams v. State*, 2007 MT 35, ¶ 43, 336 Mont. 63, 153 P.3d 601 (“An attorney’s failure to object does not constitute ineffective assistance of counsel if the objection lacked merit and would have been properly overruled.”); *State v. Upshaw*, 2006 MT 341, ¶¶ 36-44, 335 Mont. 162, 153 P.3d 579 (holding that review of counsel’s failures to object was more appropriate for post-conviction review than direct appeal); *Weaver v. State*, 2005 MT 158, ¶¶ 16-29, 327 Mont. 441, 114 P.3d 1039 (discussing during post-conviction review alleged deficiencies in trial counsel’s investigation and impeachment); *State v. Russell*, 2001 MT 278, ¶¶ 14-19, 307 Mont. 322, 37 P.3d 678 (holding that a claim regarding defense counsel’s failure to challenge a prospective juror for cause was not appropriate for review on direct appeal).

Gunderson could also argue trial counsel provided ineffective assistance by not requesting lesser-included offense instructions on misdemeanor trespass and misdemeanor attempted sexual assault. (*See* Trial Tr. at 450-60.) A defendant is entitled to lesser-included offense instructions when the trial evidence could

support the jury finding the lesser offenses. Mont. Code Ann. § 46-16-607(2); *State v. Martinez*, 1998 MT 265, ¶ 10, 291 Mont. 265, 968 P.2d 705.

Trespass is a lesser-included offense of burglary. *State v. Dixon*, 2000 MT 82, ¶ 35, 299 Mont 165, 998 P.2d 544. There was evidence at trial to support a finding that although Gunderson unlawfully entered Randall’s apartment, in doing so he did not have the purpose to sexual assault her. (Trial Tr. at 403.)

Although this Court has not determined as a matter of whether sexual assault is a lesser-included offense of SIWC, the Court has assumed it to be a lesser-included offense for the purposes of numerous decisions. *State v. Stevens*, 2002 MT 181, ¶ 54, 311 Mont. 52, 53 P.3d 356. The two offenses--and hence, attempt of the two offenses--appear to differ only in the respect that the “sexual contact” required for sexual assault is a less serious injury than the “sexual intercourse” required for SIWC. *See* Mont. Code Ann. §§ 45-2-101(67) (defining “sexual contact”), -101(68) (defining “sexual intercourse”), 45-5-502(1) (defining “sexual assault” as “knowingly subject[ing] another person to any sexual contact without consent”), -503(1) (defining SIWC as “knowingly [having] sexual intercourse without consent”), 46-1-202(9) (defining “included offense”). Gunderson could argue that the trial evidence that he touched Randall’s hip and kissed her neck but made no move towards penetrating her supported conviction of the lesser-included

offense of attempted sexual assault. Proof of a completed sexual assault does not bar conviction for attempted sexual assault. Mont. Code Ann. § 45-4-103(5).

Upon the above, Gunderson could argue that because the district court would have been required to instruct on trespass and sexual assault if defense counsel had requested such instructions and because these offenses both carry only misdemeanor penalties, defense counsel was ineffective for not requesting them. Gunderson could also argue that claim is appropriate for direct appeal review because there was no legitimate tactical reason for not requesting these misdemeanor instructions. *See Koughl*, ¶¶ 20-22.

CONCLUSION

Gunderson's appeal is frivolous and this Court should grant the undersigned's motion to withdraw as counsel on direct appeal. If the Court determines there are issues warranting an appeal brief, counsel requests the Court set them out in its Order and allow undersigned counsel to remain in the case and to proceed with briefing.

Respectfully submitted this ____ day of March, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this *Anders* brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 9,501 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

KOAN MERCER

APPENDIX

Appendix 1 Judgment

Appendix 2 Order Denying Defendant's Motion for a New Trial